

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0014-PR
)	DEPARTMENT A
Petitioner,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES STUART REICHERT,)	the Supreme Court
)	
Respondent.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092446001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
By Nicolette Kneup

Tucson
Attorneys for Petitioner

The Law Offices of Stephanie K. Bond, P.C.
By Stephanie K. Bond

Tucson
Attorney for Respondent

HOWARD, Chief Judge.

¶1 The state seeks review of the trial court's order granting James Reichert post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that

ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Reichert was convicted after a jury trial of two counts each of aggravated driving under the influence of an intoxicant (DUI) and driving with an alcohol concentration (AC) of .08 or greater, while his license was suspended, canceled, revoked, refused, or restricted. The trial court sentenced him to enhanced, presumptive, ten-year terms of imprisonment, to be served concurrently. We affirmed his convictions and sentences on appeal. *State v. Reichert*, No. 2 CA-CR 2010-0037 (memorandum decision filed Aug. 31, 2010).

¶3 Reichert filed a petition for post-conviction relief arguing his trial counsel had been ineffective in failing to file a pretrial motion to dismiss or motion to preclude the results of the blood test administered by police officers and in failing to present expert testimony that his AC might have been elevated because of his aborted blood plasma donation earlier in the day of his arrest and to challenge the reliability of the blood analysis on other grounds. The trial court summarily denied relief, but we granted partial relief on review, concluding Reichert had raised a colorable claim that his trial counsel had been ineffective in failing to file a motion to suppress or motion to dismiss on the basis that the state had wrongly interfered with his right to counsel, and remanding the case for an evidentiary hearing on that issue. *State v. Reichert*, No. 2 CA-CR 2011-0190-PR (memorandum decision filed Sept. 26, 2011).

¶4 At that hearing, Tucson Police Department Officer Amanda De La Ossa testified Reichert had requested counsel only after she obtained a warrant to draw his blood because Reichert had not consented to a blood draw. According to De La Ossa, Reichert stated: “I want to speak to an attorney before you draw my blood.” De La Ossa

stated she did not permit Reichert to contact counsel at that time because the test “couldn’t be delayed any further, [and] we needed to fulfill the requirements of the warrant.” She also explained that Reichert had requested an independent blood draw, that she had taken him to a local hospital pursuant to that request, but that he had decided not to get the independent sample and subsequently was taken to jail. De La Ossa testified Reichert did not repeat his request to speak to an attorney after the blood draw.

¶5 Thomas Wilson, an attorney, testified that competent counsel would have filed a motion arguing that Reichert’s right to counsel had been violated, and that a violation of Reichert’s right to counsel would result in either the suppression of the blood evidence or dismissal of the charges. He posited that the state might have violated Reichert’s right to counsel if it was not justified in taking the blood draw without allowing him to contact an attorney. He also opined that the state might have violated Reichert’s right to counsel because it did not permit him to speak with counsel after the blood draw, and that had Reichert spoken with counsel, counsel would have advised him to obtain the independent blood draw at the hospital.

¶6 Reichert’s trial counsel testified that she had considered filing a motion to suppress based upon the state’s purported interference with Reichert’s right to counsel, but had rejected that option because it would not have led to the suppression of any statements or the blood test results. She acknowledged that she had not considered that any violation of Reichert’s right to counsel might have interfered with his ability to obtain potentially exculpatory evidence.

¶7 The trial court noted in its ruling that it “questioned” Reichert’s assertion in his affidavit¹ that he had requested counsel several times before the blood draw in light of

¹We express no opinion concerning the use of affidavits in lieu of sworn testimony at the hearing.

De La Ossa's testimony. And the court found the officer "had every right" to perform the blood draw without permitting Reichert to contact counsel. The court determined, however, that had Reichert been permitted to speak with counsel after the blood draw, he might have obtained the independent blood draw and that counsel's assistance might have led to other "potentially exculpatory evidence." Although it observed that Reichert's claims were "thinly substantiated," it granted Reichert relief, vacating his convictions and ordering a new trial.

¶8 To prevail on a claim of ineffective assistance of counsel, Reichert was required to demonstrate that his counsel's conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). And, if Reichert did not make a sufficient showing on either part of the *Strickland* test, his claim fails. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶9 Police officers must honor a DUI suspect's request for counsel unless it would impede the investigation. *See State v. Penney*, 229 Ariz. 32, ¶ 13, 270 P.3d 859, 862 (App. 2012). "Dismissal of the case with prejudice is the appropriate remedy when police conduct interferes with both the right to counsel and the ability to obtain exculpatory evidence." *Id.* ¶ 17. But, "suppression is the appropriate remedy when police interference with the right to counsel does not hamper the defendant's ability to gather exculpatory evidence." *Id.*

¶10 On review, the state asserts the "trial court's findings did not show that [Reichert] met his burden" because it did not expressly find Reichert "had established a violation of his right to counsel." We agree the court's ruling contains no express finding that Reichert's right to counsel had been violated, and we additionally observe the court's

ruling does not include an express finding that Reichert's trial counsel's failure to raise that argument fell below prevailing professional norms and resulted in prejudice.

¶11 As we noted above, the trial court granted relief after determining that, had Reichert been permitted to speak with an attorney after the blood draw, he might have obtained exculpatory evidence. And, by concluding the officer "had every right" to perform the blood draw without permitting Reichert to contact an attorney, the court appears to have rejected Reichert's claim the state had violated his right to counsel before that blood draw. Thus, arguably implicit in the court's grant of relief is a finding that the state had violated Reichert's right to counsel because it did not permit him to contact an attorney after the blood draw and that counsel's failure to raise this argument fell below prevailing professional norms.

¶12 We normally presume a trial court's ruling encompasses any required findings, *see Horton v. Mitchell*, 200 Ariz. 523, ¶ 13, 29 P.3d 870, 873 (App. 2001), and that the court knew and followed the law, *see State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). But, in these circumstances, Rule 32.8(d) requires a trial court to "make specific findings of fact[] and state expressly its conclusions of law relating to each issue presented." *See also* A.R.S. § 13-4238(D). As our supreme court noted, the findings requirement in Rule 32.8(d) serves "[a]n important purpose" by "facilitat[ing] appellate review of superior court determinations regarding post-conviction relief." *State v. Tankersley*, 211 Ariz. 323, 325, 121 P.3d 829, 831 (2005) (remanding case with instruction that trial court enter findings of fact and conclusions of law). Absent such findings and conclusions, we cannot meaningfully evaluate the court's decision to grant Reichert relief, nor the state's argument that the grant of relief was erroneous. Thus, in

light of the requirement in Rule 32.8(d) and § 13-4238(D) that the court make those findings expressly, we are compelled to grant relief.

¶13 For the reasons stated, the case is remanded for the trial court to make express findings of fact and conclusions of law as required by Rule 32.8(d).

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge